

### ***Remarks***

Claims 8 and 22 are amended. No new subject matter is added. Claims 7-15 and 19-24 remain pending in the application. Reconsideration and allowance of the pending claims is requested in light of the following remarks.

### ***Specification Objections***

The specification is objected to because amended claims 22-24 recite “an article of computer-readable media,” which, according to page 3 of the OA, is a phrase that does not find clear support or antecedent basis in the specification. Accordingly, claim 22 is amended to recite “an article of machine readable instructions,” which finds clear support in the specification at, e.g., page 10, lines 13-14. Entry of the amendment is requested as it reduces issues on appeal.

### ***Claim Rejections – 35 U.S.C. § 112, second paragraph***

Claim 8 stands rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim that subject matter that the applicant regards as the invention, and for failing “to point out what is included or excluded by the claim language.” In particular, the OA identifies a feature recited in claim 8 - “an application programming interface in accordance with Network Processing Forum” - as being indefinite.

The applicant notes that the current wording of claim 8 is actually “in which the at least one standardized application programming interface further comprising an application programming interface in accordance with is standardized to match a standard defined by the Network Processing Forum,” which, regardless of the present rejection, is confusing. Claim 8 is therefore amended to clarify the recited feature. Entry of the amendment to claim 8 is requested as it reduces issues for appeal.

The FOA indicates at page 13 that the recited “Network Processing Forum” is ill-defined. The applicant disagrees. The lack of an express definition for “Network Processing Forum” does not mean that the term is ill-defined.

The applicant submits that “Network Processing Forum” has an ordinary and customary meaning (or plain meaning) associated with it by those of ordinary skill in the art. MPEP 2111.01(III). When no express definition for a term or phrase is given in the

specification, the term should be given the ordinary and customary meaning attributed to it by those of ordinary skill in the art. MPEP 2111.01(III).

The FOA further indicates at page 13 that the claims are “intending to cover all future standards and modifications by said entity.” The applicant would point out that the breadth of a claim is not to be equated with indefiniteness. MPEP 2173.04. Claim 7, upon which claim 8 depends, is even broader in scope than claim 8. However, it does not apparently run afoul of 112, second paragraph, even though it too “intend[s] to cover all future standards” by reciting “the infrastructure module further comprising at least one standardized application programming interface.”

Claims 7-15 and 19-24 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim that subject matter that the applicant regards as the invention, and for failing “to point out what is included or excluded by the claim language.” In particular, the OA identifies a phrase that appears in claims 15, 19, and 22 - “a control portion of the control plane protocol module that is separate and distinct from the core functionality” - as being indefinite for the above reasons. The applicant respectfully disagrees.

In reviewing a claim for compliance with 35 U.S.C. 112, second paragraph, the examiner must consider the claim as a whole to determine whether the claim apprises one of ordinary skill in the art of its scope and, therefore, serves the notice function required by 35 U.S.C. 112, second paragraph, by providing clear warning to others as to what constitutes infringement of the patent. MPEP 2173.02, emphasis added. When claims 15, 19, and 22 are evaluated as a whole, it is evident that the allegedly indefinite phrase is functionally describing a component that is positively recited in the claims, in particular, the worker control plane protocol module.

The allegedly indefinite phrases as they appear in context with the worker control plane protocol module are “at least one forwarding plane having a worker control plane protocol module to implement a portion of the control plane protocol module that is separate and distinct from the core functionality” (claim 15, emphasis added) and “wherein the worker control plane protocol module implements a portion of the control plane protocol module that

is separate and distinct from the core functionality on at least one forwarding plane” (claims 19 and 22, emphasis added).

The reasoning provided at page 5 of the FOA for the rejection of these claims is that “in the claim language there is no description of what portion [of functionality] the worker plane module is implementing.” But when the claims are read as a whole, it is clearly stated in the claim language that the worker control plane protocol module is implementing *the portion of the control plane protocol module that is separate and distinct from the core functionality*.

The FOA then alleges that one of ordinary skill would not be able to ascertain what is the “separate and distinct [functionality] from the core functionality.” In order to determine what the recited “portion of the control plane protocol module that is separate and distinct from the core functionality” is, one of ordinary skill must first determine what the core functionality is. In order to determine what the core functionality is, one of ordinary skill would refer to the specification. The fact that one of ordinary skill would refer to the specification to determine what the core functionality is proves that *the claim language itself* meets the threshold requirements of clarity and precision that are required to provide clear warning to others as to what constitutes infringement of the patent.

For the above reason, it appears that the FOA is actually attempting to reject claims 15, 19, and 22 based upon a different paragraph of 35 U.S.C. 112. Consequently, withdrawal of the rejection of claims 15, 19, and 22 under 35 U.S.C. 112, second paragraph, is requested.

### ***Claim Rejections – 35 U.S.C. 101***

Claims 7-15 stand rejected under 35 USC 101 as being directed to non-statutory subject matter. The applicant respectfully disagrees.

The FOA at page 6, based only upon inspection of pages 10-11 of the specification, concludes that the recited “control plane, forwarding plane, and modules are nothing more than software components.” This is incorrect. The FOA fails to consider the specification at page 3, line 15, to page 4, line 22, where the recited control plane, forwarding plane, and backplane are all described as physical network elements and not merely software running on the network elements.

Furthermore, even if the other recited elements of claim 15 (the infrastructure module and the communication library) are considered to be nothing more than software components, this still does not make the claim non-statutory. See, e.g., MPEP 2106.01(I): “Computer programs are often recited as part of a claim. USPTO personnel should determine whether the computer program is being claimed as part of an otherwise statutory manufacture or machine. In such a case, the claim remains statutory irrespective of the fact that a computer program is included in the claim.”

It is well-established that the transitional term “comprising” as used in a claim is synonymous with “including.” MPEP 2111.03. Claim 15 is *prima facie* directed at “a system comprising.” Consequently, even if the numerous recited elements of claim 15 are still considered to be nothing more than software components, the recitation of “a system comprising” indicates that the components of the system are still being claimed as part of an otherwise statutory manufacture or machine (the system). For the above reasons, withdrawal of the 35 U.S.C. 101 rejection is requested.

### ***Claim Rejections – 35 U.S.C. 103***

Claims 7-15 and 19-24 are rejected under USC 103(a) as being unpatentable over U.S. Pub. No. 2002/0165961 to Everdell (“Everdell”) and further in view of U.S. Pat. No. 6,999,454 to Crump (“Crump”). The applicant respectfully disagrees.

The Supreme Court has identified a number of rationales to support a conclusion of obviousness that are consistent with the proper “functional approach” to the determination of obviousness as laid down in *Graham*. MPEP 2143, citing *KSR International Co. v. Teleflex Inc.*, 550 U.S. \_\_\_, \_\_\_ 35 USPQ2d 1385, 1395-1397 (2007). The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. MPEP 2143. The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. MPEP 2143.

The rationale provided by the OA at pages 6-12 for supporting the conclusion of obviousness for claims 7-15 and 19-24 appears most closely akin to the *KSR* rationale of combining prior art elements according to known methods to yield predictable results. MPEP 2143(A). To reject a claim under this rationale, the examiner must articulate several findings, one of which includes the finding that the prior art included each element claimed.

MPEP 2143(A). If this finding cannot be made, then this rationale cannot be used to support a conclusion that the claim would have been obvious to one of ordinary skill in the art. MPEP 2143(A).

Claim 15 recites at least one forwarding plane having a worker control plane protocol module to implement a portion of the control plane protocol module that is separate and distinct from the core functionality. Claims 19 and 22 recite that the worker control plane protocol module implements a portion of the control plane protocol module that is separate and distinct from the core functionality on at least one forwarding plane. Thus, the claims do not merely require the worker control plane protocol module to implement a portion of the control plane protocol that is separate and distinct from the core functionality, they additionally require that the worker control plane protocol module implement said portion on at least one forwarding plane.

At page 7 of the FOA, Everdell is alleged to disclose the feature of at least one forwarding plane that includes the worker control plane protocol module, but the FOA recognizes at page 8 that Everdell “did not disclose [the worker control plane protocol module] implementing a portion of the control plane protocol module that is [separate and distinct] from the core functionality.” Rather, Crump is alleged to teach this feature because Crump states “*the control plane* is split into box management control functions and routing control functions” (column 6, lines 55-65 emphasis added). Note that Crump is referring to the control plane, and not to the forwarding plane. According to claims 15, 19, and 22, it is the worker control plane protocol module that is included on the *at least one forwarding plane* that must implement a portion of the control plane protocol module that is separate and distinct from the core functionality.

Even if the alleged teachings of Everdell and Crump identified above are combined as suggested, it would still not include the identified elements of claims 15, 19, and 22. Crump may teach that *the control plane* is split into separate functions, but it still does not teach implementing a portion of the control plane protocol module that is separate and distinct from the core functionality *on at least one forwarding plane* (emphasis added).

Crump teaches at column 6, lines 36-38, that “the fourth generation router 600 supports a distributed control plane that runs independently of the forwarding plane,” clearly indicating that the router 600 does not implement control plane functions on the forwarding

plane. Within Crump's fourth generation router 600, the control plane is separated into routing control functions (distributed across the cards 610 and 640) and box management control functions (isolated to the card 610), where the cards 610 and 640 are all part of the router 600 (FIG. 6; column 6, lines 27-32; emphasis added). Crump cannot teach implementing control plane functions on the forwarding plane if the router 600 supports a distributed control plane that runs independently of the forwarding plane.

For at least the reason identified above, the finding that the prior art included each element claimed cannot be made. Consequently, the rationale provided in the OA is insufficient to support a conclusion of obviousness for claims 15, 19, and 22. MPEP 2143(A). Claims 7-14, 20-21, and 23-24 are allowable at least because any claim that depends from a nonobvious independent claim is also nonobvious. MPEP 2143.03.

The FOA suggests at page 16 that the applicant "appears to be implying that the claimed invention forwarding plane is actually implementing a shared functionality" and further that "this argument is contradictory to what the claimed language indicates." The applicant believes the claim language speaks for itself, and refutes any suggestion that the actual operation of the invention is contradictory to what is actually stated by the claim. The applicant has consistently identified features recited in the independent claims and pointed out why the cited prior art fails to disclose those features.

***Conclusion***

For the reasons presented above, reconsideration and allowance of the pending claims is requested. Please telephone the undersigned at (503) 222-3613 if it appears that an interview would be helpful in advancing the case.

**Customer No. 32231**

Respectfully submitted,

MARGER JOHNSON & McCOLLOM, P.C.

A handwritten signature in dark ink, appearing to read "Todd J. Iverson", is written over a horizontal line.

Todd J. Iverson

Reg. No. 53,057

210 SW Morrison St., Suite 400  
Portland, OR 97204  
(503) 222-3613